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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1990

JOSEPH C. NEAL,

Petitioner

vs.

JOHN HAWLEY, Warden,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Question 1: Does the Supreme Court ruling in *Tollett v. Henderson*, 411 U.S. 238 (1973), barring certain types of claims when a defendant has pled guilty, apply to bar a claim of ineffective assistance of counsel?

Question 2: Does an attorney fail to act effectively when he encourages his client to plead guilty while withholding from his client information about critical weaknesses in the prosecution's case, which information would have prevented the defendant from waiving his right to trial?

Question 3: Does an attorney fail to act effectively when there is a genuine question of the defendant's sanity and competence, but the attorney fails to properly pursue the defense and seek an independent psychological evaluation?

Question 4: Was trial counsel ineffective for informing Petitioner that if he pled guilty the judge would be limited to a sentence of 15 to 20 years, when in fact the judge's discretion allowed a higher sentence?

Question 5: Was trial counsel ineffective for various other shortcomings in representing Petitioner?

Question 6: Did the District Court err by failing to have an evidentiary hearing on the claim of ineffective assistance of counsel?

Question 7: Do excessive delay in processing an appeal, the appointment of numerous different counsel none of whom would file an appeal, and lying by counsel to Petitioner that the appeal was filed when it was not, and other shortcomings constitute ineffective assistance of appellate counsel?

Question 8: Should the kidnapping conviction have been vacated because no kidnapping was shown?

Question 9: Can a guilty plea properly be taken when the defendant is incompetent because of mental illness and because local officials kept him on a heavy- diet of psychotropic drugs?

Question 10: Must the federal court accept a state court finding that the Petitioner was competent when the evidence is clearly to the contrary?

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

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Petitioner

vs.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joseph C. Neal, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued April 10, 1991.

OPINIONS BELOW

The ruling of the Sixth Circuit Court of Appeals of April 10, 1991 is attached as Appendix A. The opinion of the United States District Court for the Eastern District of Michigan of September 28, 1990 is attached as Appendix B. The Magistrate's Report and Recommendation of September 19, 1990 is attached as Appendix C.

STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254. Habeas corpus relief was denied. A Certificate of Probable Cause to Appeal was denied.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit denying a Certificate of Probable Cause to Appeal and thereby affirming the District Court was entered April 10, 1991. By Order of Justice Stevens, time for filing this Petition was extended to September 5, 1991, Case No. A-952. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

28 U.S.C. §2254(d)(8) provides in pertinent part:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof

were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless ... the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not supported by the record.

STATEMENT OF THE CASE

Petitioner Joseph C. Neal is presently serving 2 concurrent sentences of 40 to 60 years imprisonment in a Michigan state prison upon his convictions for first degree criminal sexual conduct, M.C.L. 750.520b, and kidnapping, M.C.L. 750.349. The convictions arose out of a single incident. Judge Judith Fullerton imposed the sentences on October 19, 1984, after Petitioner pled guilty.

Appeals were denied in the Michigan Court of Appeals and Michigan Supreme Court. Habeas Corpus was denied in the U.S. District Court and U.S. Court of Appeals. The District Court refused to hold an evidentiary hearing. The Sixth Circuit refused to issue a Certificate of Probable Cause to Appeal by order dated April 10, 1991. By order of Justice Stevens, the time for filing this Petition was extended to September 5, 1991, Case No. A-952.

An evidentiary hearing on a motion to withdraw the plea was held March 15, 1985. The testimony at the hearing was that at the time of the plea, while Petitioner was incarcerated in the Genesee County Jail, he was being treated for a severe psychotic condition with the psychotropic drugs Prolixin, Cogentin, and Chlorpromazine. (T Mar 15 1985, 27-30).

Petitioner himself testified that he did not understand what was happening in court at the time of

the plea. (T Mar 15 1985, 5-8). He testified that the effects of the drugs were that he "Couldn't think--I couldn't think properly because I had to--it took a lot for me to make the right decisions. I just couldn't seem to--It seemed like I wasn't--It was--It seemed like I was two people. One person was inside and one person was out. I kept complaining about it. I always told the Doctor about it, but they told me it's for my own good and made me have--and made me have a lapse in my memory like I--Something happened today and I couldn't remember it tomorrow, you know? My mind would come and go." (T Mar 15 1985, 9).

Psychiatrist Dr. Gong Yoo testified that he was employed at the jail and treated Petitioner. He diagnosed Petitioner as having schizophrenia. (T Mar 15 1985, 25). At times Petitioner was psychotic, which means that "he has a poor reality testing...he cannot differentiate between himself and an object, and the details their thinking is not clear and judgment is grossly impaired." (T Mar 15 1985, 25). Petitioner was hearing voices which told him to kill himself. (T Mar 15 1985, 28).

No other witnesses testified at the hearing. The trial judge ruled that Petitioner was competent at the time of the plea and that it would not be withdrawn. The U.S. District Court found that it was bound by the state court judge's ruling that Petitioner was competent, and declined to have a hearing or review

that state court ruling.

At the time of the plea, Petitioner stated, as instructed by his counsel, that he had sexual intercourse with a 10 year old girl. Before that time, Petitioner had consistently stated that he was innocent of the charges.

Before the plea, defense counsel did not review the police reports and failed to learn of, and to inform Defendant of, critical weaknesses in the prosecution's case. Specifically, this included the fact that the witness had failed to identify Petitioner as her assailant at the first pretrial showup, and the witness had failed to identify the motel where Petitioner's girlfriend had rented a room as the motel where the sexual acts took place.

At a later pretrial showup, after the girl had been shown Petitioner's picture by police, she identified Petitioner. At that showup, there was no lawyer to represent Petitioner. However, court documents reveal that in place of a lawyer the police got Ivor Jones, a court employee, to be present. Mr. Jones at no time represented Petitioner, and never spoke with Petitioner. No motions to suppress identification were filed by Kim Shaw, the attorney who actually represented Petitioner.

A state-employed psychologist had issued an opinion before trial that Petitioner was sane. Defense counsel got an order from the judge allowing an

independent psychological examination, provided that the expenses were approved by court employee Ivor Jones. However, counsel never followed through, and had Petitioner plead guilty to an offense carrying a penalty of life or any term of years without ever finding out if an insanity defense would have been feasible.

Defense counsel filed a Notice of Insanity Defense, listing as his only witness the same state-employed psychologist who had already found Petitioner to be sane.

Defense counsel informed Petitioner that if he pled guilty the judge would be limited to the sentence in the Michigan Sentencing Guidelines, that is, 15 to 20 years. However, the judge was permitted to and did impose a higher sentence of 40 to 60 years.

Defense counsel at sentencing failed to object to the court's use of an alleged juvenile record which had been expunged and at which Petitioner had not been represented by counsel.

At the time of the plea to kidnapping, Petitioner did not admit to facts which constitute a kidnapping.

On his appeal, seven different lawyers ended up representing Petitioner without filing anything. One falsely told Petitioner he had filed a brief when he had not. It was years later that the eighth lawyer finally filed something.

Other facts relevant to this case are stated infra.

REASONS FOR GRANTING THE WRIT

Question 1: Does the Supreme Court ruling in *Tollett v. Henderson*, 411 U.S. 238 (1973), barring certain types of claims when a defendant has pled guilty, apply to bar a claim of ineffective assistance of counsel?

Both the Magistrate and the District Judge found that the Supreme Court decision in *Tollett v. Henderson*, 411 U.S. 258; 93 S.Ct. 1602; 36 L.Ed.2d 235 (1973) is "controlling and dispositive" with respect to Petitioner's claim of ineffective assistance of counsel. (Mag. Rpt. 14-15; Opinion and Order, 2-3). Although *Tollett v. Henderson* restricts a number of potential claims for a defendant who has pled guilty, ineffective assistance of counsel is one that was expressly excepted from the scope of *Tollett*.

In *Tollett*, ineffective assistance of counsel was not raised. The issue was racial discrimination in the grand jury. Nevertheless, the Court went out of its way to discuss *McMann v. Richardson*, 397 U.S. 759; 90 S.Ct. 1441; 25 L.Ed.2d 763 (1970), a case which held there can be a valid claim of ineffective assitance of counsel even when a defendant pleads guilty. *Tollett* reaffirmed that pleading guilty does not waive a claim of ineffective counsel. See 411 U.S. at

266-267:

> "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.' *McMann v. Richardson*, supra, at 771. [397 U.S. 759; 90 S.Ct. 1441; 25 L.Ed.2d 763 (1970)]. Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof. Thus while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief."

Indeed, federal courts have repeatedly ruled that ineffective assistance of counsel claims could be asserted by defendants who had pled guilty. *Turner v. State of Tennessee*, 858 F.2d 1021 (6th Cir. 1988), remanded on other grounds, *Tennessee v. Turner*, 109 S.Ct. 3208 (1989); *Johnson v. Duckworth*, 793 F.2d 898, 900-902 (7th Cir. 1986); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982); *Beckham v. Wainwright*, 639 F 2d 262 (5th Cir. 1981); *Hammond v. United States*, 528 F.2d 15

(4th Cir. 1975); *Stewart v. Wainwright*, 309 F. Supp. 1023 (M.D. Fla. 1969); *Smotherman v. Beto*, 276 F. Supp. 579, 585 (N.D. Tex. 1967).

The instant rulings that find *Tollett* "controlling and dispositive," even though the issue raised was ineffective assistance of counsel, are contrary to numerous federal decisions as well as *Tollett* itself. This Court should therefore grant certiorari to resolve this apparent conflict of law.

Question 2: Does an attorney fail to act effectively when he encourages his client to plead guilty while withholding from his client information about critical weaknesses in the prosecution's case, which information would have prevented the defendant from waiving his right to trial?

When Petitioner pled guilty, he told the court as his lawyer instructed that he was the one who assaulted the complainant. However, before that plea was entered, Petitioner had made no such admissions, but had consistently denied being the assailant. In such a case, it is critically important that a defendant receive correct advice and full information before deciding to enter a guilty plea which contains such admissions.

In this case, at the photo showup, the complainant

saw Petitioner's photo, yet failed to identify Petitioner as her assailant. The subsequent identification of Petitioner by the complainant was sufficiently tainted to be suppressed, because of the suggestive nature of the later identification proceeding and the absence of any attorney representing Petitioner. *United States v. Wade*, 388 U.S. 218; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967); *Simmons v. United States*, 390 U.S. 377; 88 S.Ct. 967; 19 L.Ed.2d 1247 (1968). Even if not suppressed, the identification would be impeachable at trial. The complainant was certain that her assailant had a mustache and beard, while Petitioner could prove that he had no mustache or beard at that time. No defendant could make an informed decision to forego or proceed with a trial without knowing that the prosecution's case had such glaring flaws in it.

Similarly, a major piece of evidence in the prosecutor's case was that Petitioner's girlfriend Linda Standard had rented Room 7 at Mum's Motel. Although the complainant did state she was taken to a Room 7 in some motel, the lawyer failed to advise the client that the complainant could not identify Mum's as the motel to which she was taken. The failure of the complainant to identify Mum's Motel was another critical shortcoming in the prosecution's case that a defendant would have to know in order to intelligently decide whether to waive a trial and plead guilty.

A criminal defendant is entitled to the effective

assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759; 90 S.Ct. 1441; 25 L.Ed.2d 763 (1970); U.S. Const., Amend VI.

In determining whether to plead guilty, one critical factor is "the convincing nature of the evidence against the accused." *Tollett v. Henderson*, 411 U.S. at 268. It is the duty of defense counsel to read the police reports, discover the weaknesses in the prosecution's case, and inform the accused of those weaknesses so that a knowing and intelligent decision to plead guilty or not guilty can be made. Where counsel falsely portrays a case as overwhelming and fails to discover key points of weakness because he has not taken the time to read the police reports or go over them with the accused, this does not fall within the range of competence demanded of criminal attorneys, and the decision to plead guilty is based on false information.

The actions of the attorney demonstrated that the attorney was more interested in securing a plea than in providing information to his client that might compel the attorney to go through a trial. All attorneys know that it is much easier on the attorney if the client pleads guilty instead of insisting on a trial. Nevertheless, the attorney has a duty to inform the client of facts relevant to the decision-making process, even when such revelations may end up making more work for the attorney.

When the attorney places his own interest in avoiding the work of a trial above the client's interest in having his plea be knowing, voluntary and intelligent, there is a conflict of interest which amounts to ineffective assistance of counsel. *Glasser v. United States*, 315 U.S. 60; 62 S.Ct 457; 86 L.Ed. 680 (1942); *Holloway v. Arkansas*, 435 U.S .475; 98 S.Ct. 1173; 55 L.Ed.2d 426 (1978). An attorney is to vigorously act to advance the interests of his client, undeflected by conflicting considerations. *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).

The question of whether there was ineffective assistance of counsel regarding a guilty plea cannot be determined, as did the District Court, on the basis that the defendant admitted guilt. Otherwise, ineffective assistance of counsel would always be barred in guilty plea cases, contrary to the holdings described supra. Even those who ultimately end up admitting guilt have the right to know about weaknesses in the prosecutor's case that would affect the wisdom of the decision to plead guilty.

Question 3: Does an attorney fail to act effectively when there is a genuine question of the defendant's sanity and competence, but the attorney fails to properly pursue the defense and seek an independent psychological evaluation?

Question 4: Was trial counsel ineffective for informing Petitioner that if he pled guilty the judge would be limited to a sentence of 15 to 20 years, when in fact the judge's discretion allowed a higher sentence?

Question 5: Was trial counsel ineffective for various other shortcomings in representing Petitioner?

Prior to trial, psychologist Ira K. Packer testified that Petitioner was competent to stand trial and not insane. Judge Judith Fullerton approved an expenditure of $500 to get an independent psychological evaluation. (T Aug 13 1984, 10). Counsel failed to secure an independent evaluation despite the favorable ruling of the judge. Counsel then filed a Notice of Insanity Defense, listing as his witness Ira K. Packer, the psychologist who had already found Petitioner to be sane. The filing of this notice was not designed to advance the interests of the Petitioner; rather, it was filed to give the appearance that counsel was doing something for Petitioner. Relying on Mr. Packer alone, without an independent evaluation, counsel could not properly investigate or present an insanity defense, and his lack of preparedness was a key factor in inducing Petitioner to plead guilty. The

failure to investigate and pursue the insanity defense by getting an independent evaluation was ineffective assistance of counsel under U.S. Const., Amend VI. *Wood v. Zahradnick*, 430 F. Supp. 107 (E.D. Va. 1977); 577 F.2d 980 (4th Cir. 1978); 611 F.2d 1383 (4th Cir. 1980). *Wilson v. Cowan*, 578 F.2d 166 (6th Cir. 1978); *Beasley v. United States*, supra; *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978).

It was also ineffective assistance of counsel to inform Petitioner that he would be sentenced pursuant to the Michigan Sentencing Guidelines, with a sentence of 15 to 20 years, where the court was not so limited in its discretion, and in fact gave 40 to 60 years. To be effective, counsel should not have incorrectly promised Petitioner a sentence between 15 and 20 years. *Turner v. State of Tennessee*, 858 F.2d 1021 (6th Cir. 1988), remanded on other grounds,*Tennessee v. Turner*, 109 S.Ct. 3208 (1989); *Johnson v. Duckworth*, 793 F.2d 898, 900-902 (7th Cir. 1986); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982); *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981); *Hammond v. United States*, 528 F.2d 15 (4th Cir. 1975); *Stewart v. Wainwright*, 309 F. Supp. 1023 (M.D. Fla. 1969); *Smotherman v. Beto*, 276 F. Supp. 579, 585 (N.D. Tex. 1967).

This case cannot meaningfully be distinguished

from *Beckham v. Wainwright*, where failure to properly advise of the judge's sentencing options was held to be ineffective assistance of counsel.

Counsel also failed to object at sentencing to an alleged juvenile record, where the record had been expunged, and where Petitioner had not been represented by counsel. An objection could have prevented this alleged prior record from being used against Petitioner. *In Re Faketty*, 121 Mich. App. 266 (1982); *People v. Price*, 172 Mich. App. 396 (1988); *United States v. Tucker*, 404 U.S. 443; 92 S.Ct. 589; 30 L.Ed.2d 592 (1972).

In light of Judge Fullerton's reliance on Petitioner's juvenile record in imposing sentence, (Sentence, 5), Petitioner has clearly met the standard of *Tucker*, that is, that the sentence 'might have been different." The attorney's failure to act in Petitioner's interest by seeking an exclusion of the juvenile record was ineffective assistance of counsel. *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970); *People v. Cropper*, 89 Cal. App. 3d 116; 152 Cal. Rptr. 555 (1979); *People v. Bell*, 48 N.Y.2d 933; 401 N.E.2d 180 (1979).

Question 6: Did the District Court err by failing to have an evidentiary hearing on the claim of ineffective assistance of counsel?

The U.S. Supreme Court has stated a preference for determining disputed factual issues by way of a live hearing rather than by employing speculation or presumption. *Smith v. Phillips*, 455 U.S. 209, 215-216; 102 S.Ct. 940; 71 L.Ed.2d 78 (1982); *Rushen v. Spain*, 464 U.S. 114, 119-120; 104 S.Ct. 453; 78 L.Ed.2d 267 (1983).

In *Blackledge v. Allison*, 431 U.S. 63, 72-73; 97 S.Ct. 1621; 52 L.Ed.2d 136 (1977), the Court held that in a habeas corpus case, an evidentiary hearing should be held where "allegations related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." That is precisely the situation we have here.

The failure to have an evidentiary hearing was itself error. The question of when such hearings should be held in a question of major jurisprudential significance.

Question 7: Do excessive delay in processing an appeal, the appointment of numerous different counsel none of whom would file an appeal, and lying by counsel to Petitioner that the appeal was filed when it was not, and other shortcomings constitute ineffective assistance of appellate counsel?

It is clear that a defendant has the right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387; 105 S.Ct. 830; 83 L.Ed.2d 821 (1985); *Penson v Ohio*, 488 U.S. 75; 109 S.Ct. 346; 102 L.Ed.2d 300 (1988). In this case, one lawyer after another was appointed to the case without filing anything, and one went so far as to falsely tell Petitioner the brief was filed when it was not. It took years before anything was filed. Petitioner submits that this constituted ineffective assistance of appellate counsel.

Counsel was also ineffective for failing to move to disqualify Judge Fullerton in post-trial proceedings, even though she had a conflict of interest arising out of a lawsuit against her by Petitioner.

Question 8: Should the kidnapping conviction have been vacated because no kidnapping was shown?

At the time of the guilty plea, Petitioner gave a lengthy statement of what happened. At no time did he state that the girl refused to come with him. Without such a refusal, the mere taking of the girl to a location cannot constitute kidnapping under Michigan law. *People v. Wesley*, 421 Mich. 375 (1984). Even if there was a taking against the will of the girl, this

would not be kidnapping where the taking was incidental to and for the purpose of committing a sexual assault. *Chatwin v. United States*, 326 U.S. 455, 463-464; 66 S Ct 233; 90 L Ed 198 (1946); *People v. Adams*, 389 Mich. 222 (1973); *People v. Barker*, 411 Mich. 291 (1981).

The District Court rejected this issue on the ground that there is no constitutional requirement that a factual basis be shown before a guilty plea can be accepted. To the extent that that position is supported by *North Carolina v. Alford*, 400 U.S. 25; 91 S.Ct. 160; 27 L.Ed.2d 162 (1970), this Court should revisit and overrule *Alford*. Due process cannot allow a conviction without trial to stand where the defendant does not admit guilt of the offense. U.S. Const., Amend. XIV. Without an admission, there must be a trial.

Furthermore, Michigan law requires a factual basis for a guilty plea. *Guilty Plea Cases*, 395 Mich. 96 (1975). If a state court system arbitrarily withholds the benefit of a state rule of law from a defendant, due process of law is denied. If a state court system treats similarly situated defendants differently, equal protection of law is denied. U.S. Const., Amend. XIV; *Teague v. Lane*, 489 U.S. 288; 109 S.Ct. 1060; 103 L.Ed.2d 334 (1989); *Hicks v. Oklahoma*, 447 U.S. 343; 100 S.Ct. 2227; 65 L.Ed.2d 175 (1980); *Malinski v. New York*, 324 U.S. 401,

413-414; 65 S.Ct. 781; 89 L.Ed.2d 1029 (1945); *Jones v. Russell*, 299 F. Supp. 970 (E.D. Tenn. 1968); *Braley v. Gladden*, 403 F.2d 858 (9th Cir. 1968); *Baldwin v. Blackburn*, 653 F.2d 942 (5th Cir. 1981).

Question 9: Can a guilty plea properly be taken when the defendant is incompetent because of mental illness and because local officials kept him on a heavy diet of psychotropic drugs?

Question 10: Must the federal court accept a state court finding that the Petitioner was competent when the evidence is clearly to the contrary?

It is unconstitutional to proceed with criminal proceedings against a defendant who is incompetent. *Pate v. Robinson*, 383 U.S. 375; 86 S.Ct. 836; 15 L.Ed.2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162; 95 S.Ct. 896; 43 L.Ed.2d 103 (1975); U.S. Const., Amend. XIV.

The testimony at the evidentiary hearing was that at the time of the plea, while Petitioner was incarcerated in the Genesee County Jail, he was being treated for a severe psychotic condition with the psychotropic drugs Prolixin, Cogentin, and Chlorpromazine. (T Mar 15 1985, 27-30).

Petitioner himself testified that he did not understand what was happening in court at the time of the plea. (T Mar 15 1985, 5-8). He testified that the effects of the drugs were that he "Couldn't think--I couldn't think properly because I had to--it took a lot for me to make the right decisions. I just couldn't seem to--It seemed like I wasn't--It was--It seemed like I was two people. One person was inside and one person was out. I kept complaining about it. I always told the Doctor about it, but they told me it's for my own good and made me have--and made me have a lapse in my memory like I--Something happened today and I couldn't remember it tomorrow, you know? My mind would come and go." (T Mar 15 1985, 9).

Psychiatrist Dr. Gong Yoo testified that he was employed at the jail and treated Petitioner. He diagnosed Petitioner as having schizophrenia. (T Mar 15 1985, 25). At times Petitioner was psychotic, which means that "he has a poor reality testing...he cannot differentiate between himself and an object, and the details their thinking is not clear and judgment is grossly impaired." (T Mar 15 1985, 25). Petitioner was hearing voices which told him to kill himself. (T Mar 15 1985, 28).

No other witnesses testified. Although the evidence of incompetence was unrebutted, the trial judge found that Petitioner was competent. Because that conclusion was not "fairly supported by the

record," 28 U.S.C. §2254(d)(8), the District Court erred by holding that he was bound by the state judge's findings. It is an issue of major jurisprudential significance as to whether it was proper for the federal court judge to consider himself bound, based on this type of record.

Psychotic people cannot think properly. They cannot judge whether it is better to have a guilty plea or a trial. A guilty plea by such a person cannot constitutionally be permitted to stand.

Question 10: Does a federal court properly deny a motion for certificate of probable cause where the issues are subject to legitimate dispute?

The Court of Appeals denied a certificate of probable cause on the ground that Petitioner had not shown ineffective assistance of counsel, pursuant to *Tollett v. Henderson*, supra. As noted above, *Tollett* permits a defendant pleading guilty to thereafter assert ineffective assistance of counsel, and therefore *Tollett* provides no basis for denying a certificate of probable cause.

Petitioner was advised by counsel that the judge was restricted to the sentencing guidelines, inducing Petitioenr to plead guilty, but the judge instead was

allowed to and did exceed the guidelines. This case is so similar to *Beckham v. Wainwright*, supra, that a finding of no probable cause was plainly improper.

The certificate was also denied on the ground that Petitioner had not shown he was incompetent. However, the record is a clear, unrebutted showing of incompetence.

The Magistrate and District Judge made many novel rulings of law which are obviously deserving of review under *Barefoot v. Estelle*, 463 U.S. 880; 103 S.Ct. 3383; 77 L.Ed.2d 1090 (1983), because jurists of reason could indeed resolve them differently.

Each of the issues raised allege the denial of federal rights. The above show that there are substantial, non-frivolous federal issues to be decided, and that the federal claims raised are debatable among jurists of reason, and that a court could resolve the issues in a different manner. *Barefoot v. Estelle*, supra.

Determining the standards for granting or denying a certificate of probable cause is an issue of jurisprudential significance directly presented by this case. Certiorari should be granted to resolve this question.

Conclusion.

Petitioner Joseph C. Neal respectfully submits that for the above reasons, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

JAMES STERLING LAWRENCE
(P33664)
Attorney for Petitioner Neal
515 Monroe
Detroit, MI 48226
(313) 965-4189

Dated: September 1, 1991

NO. 90-2161
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH C. NEAL,	)	Filed
	)	APR 10 1991
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
JOHN HAWLEY,	)	
	)	
Respondent-Appellee.	)	

Joseph C. Neal, a Michigan prisoner, has filed an application for a certificate of probable cause in this appeal from the district court's order dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. He also has filed motions for remand, for the appointment of counsel and for leave to file photographic exhibits with the court.

After entering a plea of guilty, Neal was convicted in the Genessee Circuit Court of first degree criminal sexual conduct and kidnapping. He was sentenced to two concurrent 40 to 60 year terms of imprisonment. His convictions were affirmed by the Michigan Court of Appeals and the Michigan Supreme Court.

In his petition for a writ of habeas corpus, Neal sought relief on grounds that both trial and appellate counsel were ineffective, that his guilty plea was involuntary, and that he was incompetent at the plea proceeding.

Upon careful consideration of the record, it is concluded that Neal has failed to make a substantial

showing that he was denied a constitutional right. *See Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). Neal has not demonstrated that he received ineffective assistance of counsel prior to entering his guilty plea or during the course of his appeals. *See Tollett v. Henderson,* 411 U.S. 258, 266 (1973), and *Jones v. Barnes,* 463 U.S. 745, 751 (1983). Neal is not entitled to relief on grounds that the plea lacked a factual basis. Finally, Neal's claim of incompetence is not supported by the record.

Accordingly, the application for a certificate of probable cause is denied, and the motions for remand, for appointment of counsel and for leave to file photographic exhibits are hereby denied as moot.

ENTERED BY ORDER OF THE COURT

Leonard Green, Jr.
Clerk

NO. 90-0654

U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JOSEPH C. NEAL,
Petitioner,

v.

CIVIL NO. 90-0654
JUDGE HORACE W. GILMORE

JOHN HAWLEY,
Respondent.
_____/

MEMORANDUM OPINION AND ORDER

Before the Court are Petitioner's Objections to the Magistrate's Report and Recommendation, which recommended that the Court grant the Defendant's Motion to Dismiss.

On March 9, 1990, Petitioner filed an application for a writ of habeas corpus under 28 USC § 2254 as a person in state custody. This application noted that Petitioner had been found guilty of criminal sexual conduct in the first degree and kidnapping in Genesee Circuit Court and that on October 19, 1984, Petitioner was sentenced to two concurrent 40 to 60-year sentences by that court. Petitioner appealed his conviction to the Michigan Court of Appeals and raised the following issues: ineffective trial counsel, defective plea, excessive sentence based on impermissible reasons, and kidnapping plea lacked factual basis. The Michigan Court of Appeals affirmed his conviction on May 23, 1988. Petitioner attempted to take his case to

the Michigan Supreme Court, raising the same grounds, but on Nov. 30, 1988, that court also affirmed his conviction. Petitioner twice filed motions with the Genesee County Circuit Court, seeking post-conviction proceedings, but his motions were denied on March 15, 1990 and January 16, 1990.

In the instant petition, Petitioner states that he (1) received ineffective assistance from his trial counsel, (2) received ineffective counsel from his appeal counsel. (3) was erroneously convicted on his plea of guilty to kidnapping, and (4) was incompetent at his plea taking proceeding.

The Magistrate in this case exhaustively described the proceedings in State court, including Petitioner's several appearances before Judge Fullerton, in which the Judge arraigned Petitioner, heard motions filed by both the State and Petitioner's attorney, took Petitioner's guilty plea, sentenced him, heard evidence regarding whether Petitioner was competent when he entered his plea, and finally heard evidence on a motion to set aside the sentence and for resentencing. At each of these appearances, Petitioner was represented by counsel.

The Magistrate first determined that Petitioner's first claim, that he was denied ineffective assistance of counsel [sic] because his attorney failed to file any motions challenging the victim's identification of Petitioner or for an independent additional psychological examination, was unpersuasive. He found the following language of Tollett v. Henderson, 411 U.S. 258 (1973), "controlling and dispositive:"

> Where a state criminal defendant, on advice of counsel, pleads guilty, he cannot in a federal habeas corpus proceeding raise

> independent claims relating to the deprivation of constitutional rights that antedated the plea . . . but may only attack the voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within the standards of McMann v. Richardson, 397 U.S. 759.

The Magistrate further determined that there was no ineffective assistance of counsel in failing to challenge the victim's identification of the Petitioner, because Petitioner admitted to the Court that he assaulted the victim. Moreover, the Magistrate determined that Petitioner's attorney took initial steps to secure an additional psychological evaluation. Finally, Petitioner expressly waived an intoxication defense when he pleaded guilty, and considering the fact that Petitioner's counsel obtained a dismissal of like charges through the plea agreement, there is little basis for Petitioner to argue that he did not act competently. Petitioner's objections on this issue are unavailing. First he raises new arguments regarding the fact that his attorney failed to file a motion to disqualify Judge Fullerton and that with one attorney, Mr. Archer, there was a fee dispute. Moreover, he now argues that he entered into no agreement, an argument clearly inconsistent with the record.

Petitioner's second claim is that he received ineffective assistance of appellate counsel. The Magistrate properly determined that Petitioner was subject to the procedural default rule requiring him to show both cause and prejudice for failing to appeal a January 16, 1990 decision of the circuit court rejecting this claim. Plaintiff cannot show prejudice. Though there was delay in hearing the appeal, Petitioner points to no

specific issue or failure by counsel. In his objections, Petitioner argues only that the Court of Appeals was biased.

Petitioner's third claim is that he was erroneously convicted on his plea of guilty to kidnapping. This claim is disposed of by the Magistrate's determination that there is no federal constitutional requirement that a factual basis must be shown before a guilty plea can be accepted.

Finally, Petitioner argues that he was not competent when he pleaded guilty. Judge Fullerton held an evidentiary hearing on this issue and wrote an opinion finding that he was competent. Her opinion is presumptively correct under the habeas statute. The evidence presented by Petitioner was clearly insufficient to support his claim that he was not competent. Most notably, his witness Dr. Yoo testified that he could not give an opinion as to Petitioner's condition on the day he pleaded guilty and that the medication Petitioner was taking at the time, even if taken in overdose, would not affect Petitioner's thinking. Moreover, Petitioner's witness was not a forensic psychiatrist. Though Petitioner objects strenuously on this issue, he does not demonstrate any basis for disagreeing with the Magistrate's determination.

For the reasons stated above, this Court hereby adopts the Magistrate's Report and Recommendation granting Respondent's Motion to Dismiss.

IT IS SO ORDERED.

_____

HORACE W. GILMORE
U. S. DISTRICT JUDGE

Dated: SEP 28 1990
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH C. NEAL,
Petitioner,

v.

CIVIL NO. 90-CV-70654-DT
JUDGE HORACE W. GILMORE

JOHN HAWLEY,
Respondent.
_____/

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION :

The Court should grant the Motion to Dismiss which has been filed by the Attorney General on behalf of respondent.

II. REPORT:

On March 9, 1990, petitioner filed an application for a writ of habeas corpus under 28 U.S.C. § 2254 as a person in state custody. This application noted that petitioner had been found guilty of criminal sexual conduct in the first degree and kidnapping in Genesee Circuit Court and on October 19, 1984 was sentenced to two concurrent 40 to 60-year sentences by that court. Petitioner appealed his conviction to the Michigan Court of Appeals and raised the following issues: ineffective trial counsel, defective plea, excessive sentence based on impermissible reasons, and kidnapping plea lacked

factual basis. The Michigan Court of Appeals affirmed his conviction on May 23, 1988. Petitioner attempted to take his case to the Michigan Supreme Court raising the same grounds but that court also affirmed his conviction on November 30, 1988. Petitioner twice filed motions with the Genesee County Circuit Court seeking review in post-conviction proceedings but his motions were denied on March 15, 1985 (prior to his appeal) and January 16, 1990.

As grounds for relief, petitioner states that he (1) received ineffective assistance from his trial counsel, (2) received ineffective assistance from his appeal counsel, (3) was erroneously convicted on his plea of guilty to kidnapping, and (4) was incompetent at his plea taking proceedings.

Petitioner attached to his application a 27-page document entitled Statement of Facts - Ineffective Assistance of Trial Counsel. A copy of pp. 24 - 27 of this document, comprising numbered paragraphs 1 through 13, is attached to this Report and Recommendation inasmuch as this portion of the document apparently is intended to amplify the claim of ineffective assistance of appellate counsel.

A.

On July 2, 1990, the Attorney General filed a Motion to Dismiss. The Attorney General argued that only one of petitioner's four habeas issues had been exhausted as required by 28 U.S.C. § 2254 and sought dismissal of the entire petition on the ground that the remaining three issues were unexhausted. The brief in support of the Motion to Dismiss states in part the following:

> Review of the state appellate record in petitioner's case discloses that only one of his current habeas corpus claims were presented to the state appellate courts for review. That claim involved the voluntary nature of his plea. The remaining claims of ineffective assistance of counsel -- appellate and trial -- and insufficient evidence were never presented to any Michigan court for review. Although the petitioner did raise an ineffective assistance of trial counsel claim in the Michigan Court of Appeals, that claim was vastly different from the myriad of ineffective assistance claims raised in his habeas corpus petition. Further, no claim of ineffective assistance of appellate counsel was ever raised before now. Thus, the petitioner clearly raises claims that are not exhausted for habeas corpus review. Rose v. Lundy, 455 U.S. 509, 514 (1982), requires that this mixed petition be dismissed.

(Respondent's Brief, pp. 4 - 5).

The Attorney General argues that petitioner may still raise his unexhausted issues by a motion for relief from judgment under MCR 6.502.

B.

On July 9, 1990, petitioner filed a traverse to motion to dismiss. This pleading noted that there are exceptions to the mixed petition rule and argued that the motion to dismiss should be denied. Petitioner admitted that he was convicted pursuant to a plea bargained

guilty plea on September 17, 1984 but contended that his conviction was invalid for the reasons asserted in his application for the writ of habeas corpus and in addition because the prosecutor had suppressed helpful evidence and had made knowing use of perjured testimony. Petitioner asserted that the motion to dismiss was frivolous and was simply an attempt to gain an unwarranted delay in these proceedings. Petitioner also asserted that there had been an incomplete listing of the Rule 5 material in the notice filed with the motion to dismiss.

On August 6, 1990, this Court filed a pleading received from petitioner entitled Petitioner's Pro Se Brief in Response to Respondent's Motion to Dismiss/and to Compel. This pleading contended that it was for the federal court to determine whether his federal rights had been waived. Petitioner also contended that he presented on direct appeal "to the lower court of Genesee County" five issues, namely ineffective trial counsel, ineffective appellate counsel, incompetent plea, oppressive sentence and erroneous kidnapping conviction. Petitioner also asserted that he had taken these same issues to the Michigan Court of Appeals on application for delayed leave to appeal and that his sentence and conviction had been affirmed by an order dated May 23, 1988 and again by the Michigan Supreme Court in November, 1988. Petitioner asserted that neither the state nor the federal court could expect him to remain confined on a conviction that was on its face unconstitutional and that the federal court could not expect petitioner to continually fight state oppression, bias and color bar, as to the exercise of due process in the Michigan courts for black people. Petitioner concluded by asking that the motion to dismiss be denied and respondent ordered to file an answer to his application for a writ of habeas corpus.

C.

1. The records submitted by the Attorney General include transcripts of the relevant court proceedings. The first such proceeding was the preliminary examination conducted on June 22, 1984 before District Judge Albert P. Horrigan. Petitioner, represented by attorney Kim D. Shaw, was present as was his co-defendant, Linda A. Standard, who was represented by separate counsel. The sole witness at this preliminary examination was the victim, a ten-year old girl. She testified that petitioner and his co-defendant abducted her, drove her in a car to a motel, tied her to a chair and sexually assaulted her. The victim was cross-examined briefly by both counsel. At the conclusion of this hearing, at which the victim identified both petitioner and the co-defendant as the perpetrators of this offense, the district judge bound over both defendants to stand trial on charges of criminal sexual conduct in the first degree and kidnapping.

2. On Monday, July 9, 1984, petitioner appeared with his attorney, Kim D. Shaw, before Genesee Circuit Judge Judith A. Fullerton to be arraigned on the information which had been filed by the prosecutor charging him the offenses on which he had been bound over for trial. The information was read in open court, and Judge Fullerton asked petitioner if he understood the names of the offenses with which he was charged, namely, criminal sexual conduct in the first degree in Count I and kidnapping in Count II. Petitioner responded that he did understand these charges and also knew that each count carried as much as life in prison. He acknowledged to Judge Fullerton that he understood he had a right to a trial before the court or before a jury on each count and that he had the right to

have an attorney, including an attorney provided at public expense, to represent him at all proceedings relative to these charges. Petitioner's counsel then informed the court that his client stood mute to the charges and trial was set for September 18, 1984, with a pretrial and motion cutoff date of August 20, 1984.

3. On August 13, 1984, petitioner appeared again with his counsel, Kim D. Shaw, to oppose a prosecutor's motion to have him ordered to submit to the taking of whole blood samples and saliva samples. Judge Fullerton, after hearing from both counsel, ordered petitioner to produce the requested blood and saliva samples to the appropriate authorities but provided that petitioner's counsel, Mr. Shaw, had a right to be notified and to be present at the time and place the samples were extracted.

4. On August 20, 1984, petitioner again appeared with his attorney, Kim D. Shaw, at the pretrial conducted before Judge Fullerton. Petitioner's counsel asked the court to leave the case on the trial calendar and presented two motions, one seeking an independent psychological evaluation for the defendant and the other seeking a severance of the two defendants for trial. With regard to the first motion, petitioner's counsel, Mr. Shaw, noted that he was seeking an independent psychological evaluation for petitioner. Mr. Shaw noted that there had been a forensic report run in the lower court and that there had been a competency hearing on that. Mr. Shaw asserted that based upon what he had heard from the doctor at the competency hearing previously conducted and from his reading of the forensic report, he had reason to believe that an independent examination might yield different results and requested that the court authorize such at public expense, probably amounting to some $500. After hearing from counsel , Judge Fullerton

indicated that she preferred to go ahead with the trials and if they were not resolved through some other disposition to go with a double jury.

5. On September 17, 1984, petitioner again appeared with his counsel, Kim D. Shaw, before Judge Fullerton for the purpose of entering a plea of guilty to both counts in the information. The assistant prosecutor stated that in exchange for his pleas of guilty to both counts in the information pending before the Court, he would dismiss after sentencing a like matter involving charges of criminal sexual conduct and kidnapping in a separate case pending before a different judge, Judge McAra. Petitioner acknowledged that that was a full and complete statement of the plea agreement as he understood it and that he recalled being arraigned previously in this case and being served with an information containing these charges. Judge Fullerton personally addressed petitioner at length and received his assurances that he understood the maximum penalties to involve as much as life or any term of years in prison, that he understood criminal sexual conduct was an offense for which he could not receive probation and that if his pleas of guilty were accepted, he would not receive a trial of any kind by the court or by a jury, although it was his right, if he did not plead guilty, to have a jury trial at which he would be presumed innocent until proven guilty. He also responded to Judge Fullerton's questions that he understood he was giving up his right to have witnesses appear against him at his trial and to question those witnesses, to subpoena witnesses to testify in his defense at such a trial, and to remain silent during the trial without having his silence used against him in any way. Petitioner acknowledged that Mr. Shaw, who had been appointed to represent him, had discussed the whole situation with him on numerous occasions. He denied that any promise other

than that stated in the plea agreement that had been placed on the record had been made or that anyone had threatened him in any way to get him to plead guilty. He stated that it was his own choice to enter pleas of guilty to the counts in the information and stated in his own words in response to Judge Fullerton's questions the incriminating facts concerning the kidnapping and sexual assault upon the ten-year old girl who was the victim in this case. Petitioner stated that at the time he committed the offense, he was somewhat intoxicated and had been smoking cocaine and that his intention was to take pornographic pictures of the incident. Petitioner also acknowledged that while he did not know the age of the victim she did look like a child and her age was never a question in his mind. In response to the court's inquiry, petitioner acknowledged that it was obvious to him that she was under the age of 13. Petitioner also acknowledged that he kept her in the motel room against her will and raped her. Petitioner's counsel, Mr. Shaw, noted on the record that he had previously talked with petitioner about intoxication being a defense. Petitioner stated that there was no question about that and that although intoxication could be used as a defense, he wished to waive that defense. Judge Fullerton then accepted petitioner's plea of guilty to both counts of the information.

6. On October 19, 1984, petitioner appeared with his attorney, Kim D. Shaw, before Judge Fullerton for the purpose of having sentence imposed in his case. After both counsel and petitioner acknowledged the corrections of the factual material in the presentence report, Mr. Shaw spoke in mitigation that petitioner had often expressed a good deal of remorse to counsel that the events had occurred and in counsel's view had manifested remorse by his beginning the rehabilitation process without the necessity of putting the court and the

young victims through the experience of a trial. Petitioner himself stated to Judge Fullerton that he regretted the matter. The assistant prosecutor then pointed out to the court what he construed to be the excessive violence involved and pointed to the fact that after the criminal sexual conduct had transpired, the ten-year old girl was dropped off in an area where she had no idea where she was. The assistant prosecutor asked the court to take into account the vulnerability of the victim and to note that petitioner had become increasingly involved in serious felonies having been convicted in 1969 of attempted breaking and entering and in 1973 of assault with intent to rob while armed. Mr. Shaw responded by urging the court to impose a sentence within the guidelines, saying that the factors mentioned by the assistant prosecutor were factors taken into account by these guidelines. Judge Fullerton in her comments noted that she had heard the testimony of the victim even though petitioner had pled guilty because his co-defendant proceeded to trial. She noted that petitioner was in fact a witness in that case. The presentence report indicated a substantial substance abuse problem as well as severe emotional problems. Judge Fullerton stated that the case involved a kidnapping by petitioner and his co-defendant of a ten-year old child from the parking lot of a convenience store, and the subsequent taking of this child across town to a motel where she was kept confined for several hours, tied first to a chair and later to a bed where she was sexually assaulted by the defendant at least twice and afterwards taken and left off in a neighborhood with which she was unfamiliar. Judge Fullerton also noted that in a second case, which the prosecutor had promised to dismiss at the time of sentencing in the case at bar, a second young female child was involved and petitioner was accused in that case of the same crimes

as in the case at bar. Judge Fullerton acknowledged the point made by petitioner's counsel that his client had pled guilty, but noted that she suspected his motives to some extent because he had made an effort, both in his plea and in his trial testimony, to minimize the role of his co-defendant, which was clearly different from the information presented under oath by the victim at the co-defendant's trial which was accepted by the jury before whom petitioner also testified. She then proceeded to sentence petitioner to a term of not less than 40 nor more than 60 years on each of the two counts, the sentences to run concurrently. Petitioner was advised of his right to appeal and of his right to have counsel appointed for him should he be unable to furnish his own attorney.

7. On March 15, 1985, petitioner appeared before Judge Fullerton, represented by new counsel, Mr. Barney Whitesman. The purpose of this proceeding was to present evidence in support of a motion that contended petitioner was suffering from schizophrenia when he pled guilty and was taking medication intended to control that condition but did not know what he was doing at the time either because he was sick or because of the medication which he was taking. Petitioner testified in support of his motion. His counsel then called Dr. Gong Yoo, a psychiatrist employed by Community Mental Health who treated prisoners at the Genesee County Jail in connection with his employment. On voir dire of his qualifications as an expert, Dr. Yoo acknowledged that he was not a forensic psychiatrist. Judge Fullerton indicated that this was the third case in which Dr. Yoo had become involved with inmates in the jail under what she considered perhaps inappropriate referrals. Dr. Yoo stated that he had seen petitioner on five or six different occasions while he was an inmate at the Genesee County Jail and had diagnosed him both a

latent schizophrenic and as an anti-social personality. He also noted a diagnosis of alcohol addiction and multiple drug dependence. In Dr. Yoo's opinion, petitioner's schizophrenia had reached the point where he was psychotic, which he defined as describing a person who has a poor reality testing and cannot differentiate between himself and an object, resulting in grossly impaired judgment. He prescribed or recommended various medications which he described for the court. Dr. Yoo indicated that there was some difficulty in giving these medications to petitioner until he finally agreed to take a drug known as prolixin, which is considered an anti-psychotic drug that can be given by injection and stays in the body approximately two weeks. Dr. Yoo indicated certain side effects of the medication, but stated that too much prolixin would not impair one's thinking. However, the patient might develop dryness of the mouth or drowsiness. Dr. Yoo then quoted from his records statements made by petitioner on September 7, 1984. Some of these comments indicate worry on petitioner's part about a disease of the brain and a claim that petitioner could not think right, wanted to kill himself, felt he was a prophet and was a troubled person. Petitioner appeared depressed at that time. Dr. Yoo made a recommendation for suicidal precautions but did not increase the dosage of the drug prolixin, or any other medication being administered. Dr. Yoo acknowledged that he was unable to voice a conclusion as to petitioner's condition on September 7, 1984. After hearing additional evidence from a witness presented by the prosecutor concerning the medical records of the county jail and hearing the arguments of counsel, Judge Fullerton rendered her opinion denying petitioner's motion to set aside his guilty pleas to the two counts contained in the information. A copy of pp. 54 - 59, comprising the

opinion and findings of Judge Fullerton, is attached to this Report and Recommendation.

8. Also attached to this Report and Recommendation is the opinion of the Michigan Court of Appeals dated May 23, 1988, which considered petitioner's appeal by leave granted. This opinion notes that petitioner argued he was denied the effective assistance of counsel because his attorney abandoned an insanity defense and failed to challenge a pretrial identification made by the victim in this case. The court also reviewed the claim made at the motion to set aside the plea in March, 1985 that his plea was not voluntary because he was under the influence of prescribed medication at the time the pleas were accepted by the trial court. The Michigan Court of Appeals found against petitioner on all issues.

9. On June 16, 1990 petitioner again appeared before Judge Fullerton in the company of a retained attorney, Mr. William H. Archer. Petitioner sought, through Mr. Archer, to present several motions. Judge Fullerton denied initially a motion to have an evidentiary hearing and then proceeded to consider a motion to set aside the sentence. She denied the motion to set aside the sentence and for resentencing after hearing the argument of counsel. Mr. Archer noted that the claim of ineffective assistance of appellate counsel was being made for the first time in these motion papers.

D.

While I recommend granting the motion to dismiss, I do not agree that petitioner should be put out of court for failure to exhaust. Taking into account his pro se status, and his persistent claim that he has raised his issues before the state court, I read his petition as raising the same claims before this court. It is true that

his claim of ineffective assistance of appellate counsel was raised only in the second motion filed with the circuit court which was denied in January of this year, and that no appeal was taken from that denial. However, his time to take an appeal as of right has expired, and the possibility of leave to appeal being granted as to this issue is so remote as to render the potential for appeal a futile gesture.

E.

The first issue raised in the habeas petition is ineffective assistance of trial counsel. As argued to the state appellate courts in a brief citing both state and federal caselaw, this issue was based upon Kim. D. Shaw's alleged failure to file any motions regarding the victim's identification of petitioner or for an independent additional psychological examination. I suggest the decision of the United States Supreme Court in Tollett v. Henderson, 411 U.S. 258 (1973), is controlling and dispositive. The headnote summarizes the decision:

> Where a state criminal defendant, on advice of counsel,pleads guilty he cannot in a federal habeas corpus proceeding raise independent claims relating to the deprivation of constitutional rights that antedated the plea. . . but may only attack the voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within the standards of McMann v. Richardson, 397 U.S. 759.

Petitioner admitted to the court (and presumably

to his own counsel) that he had assaulted the victim; there was no question of a misidentification by her. Contrary to petitioner's assertion, his attorney did take the initial steps to secure a further psychological evaluation, but this possible defense was apparently dropped because of the earlier evaluation referred to during the preliminary examination. Petitioner expressly waived any intoxication defense when he pled guilty. There has been no offer of proof to establish that the guilty pleas were not voluntary and intelligent. Since Mr. Shaw obtained dismissal of a second case involving like charges, there is little room for doubt that he acted on a competent manner and that petitioner's plea was a deliberate, voluntary and intelligent choice of the best option available to him. In short, the Michigan Court of Appeals correctly decided this issue.

F.

Petitioner's second claim is that he received ineffective assistance from appellate counsel. While petitioner has exhausted this claim, he is subject to the procedural default rule requiring him to show both cause and prejudice for failing to appeal the January 16, 1990 decision of the circuit judge rejecting this claim. Whatever may be offered as cause, it is clear that prejudice cannot be shown, because this is a non-issue claim. A review of pages 24 - 27 of the attachment to the petition indicates that petitioner was exasperated at the delays, and received a series of attorneys to pursue his appeal. But the long short of it is that ultimately his appeal was heard by leave granted, and petitioner points to no issue not put forward to support his claim of ineffective assistance. Even were there arguable non-frivolous claims omitted from the appeal, that would not establish ineffective assistance. Jones v. Barnes,

463 U.S. 745 (1983).

G.

Petitioner's third claim is that he was erroneously convicted on his plea of guilty to kidnapping. As argued to the Michigan Court of Appeals, petitioner's claim now seems to be that any movement of the victim from the parking lot to the motel was only for the purpose of accomplishing the sexual misconduct. That court disagreed, saying that the kidnapping was committed for the purpose of making pornographic pictures with the victim, the purpose acknowledged by petitioner when he pled guilty.

There is no federal constitutional requirement that a factual basis must be shown before a guilty plea can be accepted, but even if there were, and even if such claim had been passed in state court, a claim would fail on federal habeas review because the finding of the state court, presumptively correct, is supported by the record.

H.

Petitioner's last claim is that he was incompetent when he pleaded guilty. He was given an opportunity to prove this claim in March 1985 by Judge Fullerton. Judge Fullerton's finding that petitioner was competent, and that he had not proved the contrary, is presumptively correct under the habeas statute, and is supported by the evidence cited by Judge Fullerton in her opinion, a copy of which is attached to this report.

While there is a serious question as to whether this issue was presented as a federal constitutional one in state court, there is no question that it is an issue without merit. Even Dr. Yoo, called to support the claim

at the hearing, admitted that (1) he was not a forensic psychiatrist, (2) he could not give an opinion as to petitioner's condition on the day he pleaded guilty, (3) even an overdose of the drug petitioner was prescribed would not affect his thinking, and (4) he was prescribed medication to treat schizophrenia, and any dosage administered on September 7 would remain in the system for two weeks, well past the date of the guilty plea.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties are hereby informed that objections may be filed to this Report and Recommendations within ten days of receipt of a copy thereof as provided for in 28 U.S.C. 636(b)(1)(c) and that failure to file objections may constitute a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), states that "a party shall file objections with the district court or else waive right to appeal." See Fed.R.Civ.P. 72(b); Local Sub-Rule C-4(b).

PAUL J. KOMIVES
UNITED STATES MAGISTRATE

Dated Sept. 19, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH C. NEAL,
Plaintiff,

CASE NO.90-CV-70654-DT

HORACE W. GILMORE
UNITED STATES
DISTRICT JUDGE

vs.

JOHN HAWLEY,
Defendant.

PAUL J. KOMIVES
UNITED STATES
MAGISTRATE

ATTACHMENTS

see, sentencing transcript);

1. following petitioner's timely filed requests for the appointment of appellate counsel, Barney R. Whitesman was appointed On December 3, 1984 to handle petitioner's appeal.

2. that on March 15, 1985, an Evidentiary hearing was held to deter mine, if the court would set aside the guilty plea as being involuntary, and not understandingly made. the trial court improperly denied appellate attorney Barney Whiteman's objections, refused to acknowledge Dr. Gong Yoo as an expert witness, although he had appeared in the same capacity at prior times before the court in other case's and his qualifications warranted expert witness status, and Circuit Court Judge Judith A. Fullerton Denied the Motion to withdraw the plea.

3. that following this hearing, appellate counsel Barney R. Whitesman Failed to file a claim of appeal or take other appropriate appellate action, and on June 3, 1985, Barney Whitesman was relieved of his duties as appellate counsel.

4. that prior trial counsel Kim D. Shaw, being retained by petitioners Family, residing at Wilson Apartments, Apt. #124; G-900 Clio Rd. Flint, Michigan. 48504; that Kim D. Shaw was designated as petitioners second Appellate counsel, where upon Kim D. Shaw, forewarded petitioner a copy of an appeal brief, with a letter acknowledging same to have been submitted, on petitioner's behalf with the Michigan Court of Appeal, this was August 18, 1985; a letter from the Clerk of the court of appeals Dated, October 10, 1985, responding to petitioners inquiry as to the status of petitioners appeal,

acknowledged that No Pleadings had been filed in the Court of Appeals on behalf of this petitioner by Kim D. Shaw, By No One,. October 12, 1985, petitioner filed Grievance against appellate Counsel Kim D. Shaw, with the Attorney Grievance Commission. Suite 600, Marquette Building. 243 West Congress, Detroit, Michigan. 48226; Appellate counsel Kim D. Shaw's actions had effectivelydedeprived [sic] this petitioner of petitioners timely right of appeal. and that on December 9, 1985, Kim D. Shaw withdrew as appellate counsel not having filed a claim of appeal or taking other appropriate appellate action.

5. that on December 12, 1985, a petition was filed for the appointment of the State appellate defender office. Third Floor, Nroth [sic] Tower 1200 6th, Ave. Detroit, Michigan. 48226; Attorney James Krugsrud, was assigned this petitioner's appeal by that agency January 8, 1986, and from that date, up to, January 5, 1987, attorney James Krugsrud did not file one pleading in any court on this petitioner's behalf, who likewise failed to file claim of appeal or take other appropriate appellate action, and withdrew from the case pursuant to an Order January 5, 1987 vacating the appointment of the State Appellate Defender, James Krogsrud [sic]. signed by Circuit Court Judge Judith A Fullerton. as with all the others she appointed and then let Withdraw without having done their duty.

6. that on January 5, 1987, Judge Fullerton, issued an Order Substituting Appellate Counsel Gerald Sniderman in place of James Krugsrud, who also Failed to file a claim of appeal or take other appropriate appellate action.

7. Petitioner then January 12, 1987 wrote a letter to

Ms. Barbara Levine, Michigan Appellate Assigned Counsel Administrator. Hollister Building, Suite 365. 106 West Allegan. Lansing, Michigan. 48913; only then was it learned, that Ivor R. Jones, had communicated with appellate counsel Gerald Sniderman, to convince him not to accept the appointment, this was admitted by Mr. Ivor R. Jones in letter Mr. Jones wrote to Barbara Levine, Dated: February 19, 1987; the same Ivor R. Jones, whom previously Had represented this petitioner at petitioners Physical Line-up's Held in this Matter, The same Ivor R. Jones, whom pursuant too [sic] Judge Fullerton's Orders for appointment of counsel Had himself Assigned the attorney's in petitioners appeal, as Ivor R. Jones, is The Genesee County Indigent Assigned Counsel Administrator. office at 932 Beach Street, Flint, Michigan. 48502; thereby making Mr. Jones, My Trial Counsel's Boss: Kim D. Shaw,. The same Ivor R. Jones, who When trial counsel requested $500.00 in expense"s [sic], for the purpose of getting this petitioner an Independant Psychiatric Examination, Judge Fullerton left the Final Approval for these expense's [sic] upto Ivor R. Jones.

8. following a host of Civil Actions filed against Judge Fullerton, and Petitioners prior appellate counsel"s [sic], Civil Complaint No. 87-89308-NM et al, Genesee County Circuit Court, and Judge Fullerton March 9, 1987, being awarded Summary Judgement [sic] pursuant to an Order being issued on that Date, by Honorable Circuit Court Judge Earl Borradaile.

9. by order of appointment Genesee County Circuit Court Judge Thomas C, Yeotis Assigned attorney John J. Cantarella substituted In place of Gerald Sniderman, as petitioners appellate counsel, order being dated: March 12, 1987;

10. That on April 9, 1987 attorney John Cantarella Filed a brief on this petitioners behalf in the Michigan Court of Appeals after that Court did Grant Leave to Appeal.

11. That on May 23, 1988 the court of appeals [sic] affirmed this petitioners [sic], conviction and sentence in this case.

12. that on November 30, 1988 the Michigan Supreme Court Denied Leave to appeal the court of appeals [sic] decision which was entered May 23, 1988;

13. Appellate Counsel John Cantarella Raised three issue's on this petitioners appeal, those being.

1. Ineffective Trial Counsel
2. Impermissible reasons used by sentencing Judge to exceed the sentence Guidelines.
3. Plea of Guilty was not voluntary or knowingly made.

On Supplement Brief filed with the Court of Appeals Prior to Oral Argument. raised Two more issues. those being;

1. was trial counsel ineffective when he didn't challenge the in court Identification of petitioner.
2. that Petitioner's plea to the charge of Kidnapping lacked a factual basis.

Petitioner has exhausted state remedy as to the above mentioned issues: Further your petitioner said not.

JOSEPH NEAL
PETITIONER

in his behalf, because he wants to file an insanity defense, and again today, in this motion, he's trying to use his problem as a reason to set aside the plea and I think it's obvious that it's merely because of the sentence that Mr. Neal was given.

I don't believe that the Defendant has come any where near the standard in this matter in showing a miscarriage of justice and I'd ask that the Court deny the motion.

THE COURT: Anything else, Mr. Whitesman?

MR. WHITESMAN: Just let me check with my client.

(Counsel confers with client)

MR. WHITESMAN: Nothing further.

THE COURT: All right. Then at this time the Court will note that before the Court, that we started earlier today, was a hearing on a motion filed by the Defendant to set aside a guilty plea entered on September 17, 1984, to two felony crimes: Criminal Sexual Conduct in the First Degree and Kidnapping.

Sentence was imposed in these matters on Friday, October 19, 1984.

At all relevant times, Defendant was represented by counsel Mr. Kim Shaw. The Prosecutor was represented by Assistant Prosecutor Michael Leavitt.

It appears to the Court that the motion that has been brought by the Defendant to set aside the plea is on the grounds that Defendant somehow, because of perhaps mental illness or drugs, did not understand the Rights that he was waiving at the time the plea was entered and is now asserting that his plea was not understandingly or voluntarily made.

The Court agrees that under the circumstances and in lies of an Affidavit, Defendant Neal's testimony has provided the basis for the motion.

Now, the Court heard testimony from Mr. Neal, as

I said, as well as testimony from Doctor Yoo and Joan Beck, the Coordinator of Medical Services at the Genesee County Jail and the custodian of the records of the inmates in the jail, and introduced into evidence at the hearing as exhibit 1, was a file on Mr. Neal containing the medical records of the residents in the jail, and the records in this case started with his admission to the jail which appeared to me to--appears to me at this time, from reading the file, to have been May 4, 1984, and continued until the last entry was made on October 16th, 1984, with this statement:

> "That the Defendant is refusing Prolixin and Cogentin stating that he will be sentenced next week and he's ...."

quote:

> "...all done taking all medicine"

signed by an S. Monroe, R.N.

In the interim, since this morning when the testimony was taken, the Court has reviewed exhibit 1 in its entirety, and as I said, it contains the notes of the various medical personnel that had contact with Mr. Neal, including the dentist Doctor Wiltz and including Doctor Yoo and the nurses, and also a person referenced in the hearing, Mr. Robert Sprague, who is a M.A.M.S.S.W. and a C.S.W.

The Court notes that during the time the medical records were being created, for the most part, Defendant was in the custody of the Sheriff awaiting trial on four life felonies; two pending before this Court and two pending before Judge McAra on the third floor and the theme does appear in the records--on numerous occasions the notes contain words to the effect: "Very manipulative. He is extremely manipulative. He exaggerates the symptoms. He has strong manipulative tendencies. He

wants to be excused from his crime by reason of insanity, He sees being crazy as an escape and as a possible defense. He is struggling to find a way to avoid the consequences of his behavior", but I do note that the last time Doctor Yoo saw him, apparently on September 7, beyond what has been referenced before, it does state in the record that the Defendant's speech is clear and coherent. His thinking is clearly improved.

And then, as Mr. Leavitt has stated, when he appeared before the Court--I want to be clear on the record that he came to this Court a day before the trial to enter the plea, the trial having been set for September 7--or 18, 1984, along with his co-defendant Linda Standard and entered his plea on that date, and the Court thinks that it's possibly a good as witness as anybody to the circumstances surrounding the taking of the plea.

I would note that upon both recollection and in reviewing the transcript, that Mr. Neal was forthright and appeared to understand each and every question which obviously, under the Rule, the Court had to ask him in order to take a plea.

At all times he answered the Court's questions. He was able at transcript pages 8 through 18, to describe to the Court the facts giving the basis for the Court's acceptance of the pleas. At transcript page 6, he told me that he talked with his attorney regarding the entry of the plea. Specifically at line 21 I asked him:

> "And is it true that you have discussed this whole situation with him" - that is his attorney - "entirely?"

The Defendant responded:

> "We have numerous discussions".

And then after the factual basis was entered, the Court again asked Mr. Neal:

"We won't have a jury come in to hear the case, is that clear to you?"

Defendant Neal said:

"Yes, it is."

The main thing the Court got from Mr. Neal's testimony this morning is he's trying to tell me he doesn't remember being here to waive the various rights that are recorded in the transcript. I do not believe that that is a basis to set aside a plea. I see nothing about Mr. Neal's behaviour in any--on any one of the occasions when I've had him before me, starting the date of his arraignment on July 9, I believe, of 1984, up to the present, that has caused me to have any concern whatsoever that he didn't understand what was going on, or to cause me to believe that he was unable to participate in the proceeding in a meaningful and understanding way.

I think, as has been pointed out, that it is true that he was in a difficult situation facing the four life felonies and having come to the difficult decision about whether to go to trial on both cases, or to enter a plea, and I think if one reads everything written in the medical records that he did display some degree of remorse and concern about the kind of behavior. He was looking for a way out and didn't like the consequences that he might face if he were either to plead guilty or to be convicted.

Nothing new presented today that causes me to think that anything he has said today is anything less than self serving declarations with respect to his lack of memory, and I'm not persuaded that it's true that he

doesn't remember, and even if he doesn't remember, I don't find that to be a reason to find that he didn't knowingly and understandingly waive the right to enter the plea of guilty on September 17, 1984, that he entered.

And for all these reasons that I've now stated on the record, the Court will ask the Prosecutor to prepare an order denying Defendant's request to have his plea set aside.

Anything else? Mr. Whitesman?

MR. WHITESMAN: Nothing. Thank you for your consideration.

THE COURT: Mr. Leavitt?

Mr. LEAVITT: Nothing, Judge.

(Proceedings concluded at 5:21 p.m.)

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

May 23 1988

V

No. 876809

JOSEPH C. NEAL,
Defendant-Appellant.

BEFORE: Beasley, P.J., Hood and R.L. Tahvonen*, JJ.

PER CURIAM

Defendant Joseph C. Neal pled guilty to criminal sexual conduct in the first-degree, MCL 750.520(b)(1)(a); MSA 28.788(2)(1)(a), and kidnapping, MCL 750.349; MSA 28.581. Defendant was sentenced to concurrent terms of 40 to 60 years in prison on each count. Defendant appeals by leave granted. We affirm.

Defendant first argues that he was denied the effective assistance of trial counsel because (1) counsel abandoned the insanity defense and (2) counsel failed to challenge a pretrial identification made by the victim in this case.

For 12 years the controlling Michigan case on ineffective assistance of counsel was People v Garcia, 398 Mich 250; 247 NW2d 547 (1976), reh den 399 Mich 1041 (1977). However, in 1984 the United States Supreme Court decided Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We are persuaded that the Strickland standard should be utilized by Michigan courts in evaluating claims of

ineffective assistance of counsel. Because Garcia purported to construe applicable federal standards, we are satisfied that the Michigan Supreme Court will modify Garcia to comport with the more recent pronouncement of federal law in Strickland. See People v Dalessandro, 165 Mich App 569; __ Nw2d __ (1988).

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*Circuit Judge, sitting on the Court of Appeals by assignment.

Applying the Strickland standard here, we are persuaded that defendant was not denied effective assistance of counsel. Defense counsel at trial abandoned the insanity defense only after a report from the Forensic Center indicated that defendant was both competent to stand trial and criminally responsible for his actions. This is not a situation where the insanity defense was never explored by defense counsel or was abandoned without a psychiatric evaluation. Although defendant was entitled to an independent psychiatric evaluation after the report from the Forensic Center, we are not persuaded that defense counsel's failure to request such an independent evaluation constitutes ineffective assistance of counsel.

We also conclude that defense counsel's failure to challenge the pretrial identification by the victim and to request a Wade hearing on that question, United States v Wade, 388 US 218; 87 S Ct 1926; 18 L Ed 1149 (1967), did not constitute a serious mistake such that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Nor has defendant shown that defense counsel 's failure to request a Wade hearing prejudiced defendant, since defendant has not shown that the trial court would have suppressed the victim's identification testimony. Strickland, 466 US

687-689; Dalessandro, supra, 573.

Defendant next argues that his pleas were not voluntary because he was under the influence of prescribed medication at the time the pleas were accepted by the trial ccurt. An evidentiary hearing was held on defendant's motion to withdraw his guilty plea. Following that hearing, the trial court determined that defendant's pleas were voluntarily made and denied his motion to withdraw the pleas. That decision was made after the trial court had an opportunity to hear the testimony of defendant and of psychiatrists Gong Yoo and Joan Beck.

Where a defendant seeks to set aside a guilty plea after conviction and sentence, the motion is addressed to the discretion of the trial court. That court must determine whether the defendant has shown that his plea-based conviction constitutes a "miscarriage of justice". People v Winegar, 380 Mich 719; 158 NW2d 395 (1968). People v Lippert, 79 Mich App 730; 263 NW2d 268 (1977).

Having reviewed the record of the evidentiary hearing on defendant's motion, we are persuaded that the trial court did not abuse its discretion in determining that defendant failed to establish a miscarriage of justice warranting withdrawl of his plea. There is substantial evidence that the plea was offered voluntarily and knowingly by defendant. The fact that defendant was taking prescribed medication does not, in and of itself, invalidate his plea or establish that it was involuntary.

By way of supplemental brief, defendant further claims that there was an inadequate factual basis to support the kidnapping plea, since any movement of the young victim was merely incidental to defendant's "purpose *** to accomplish the sexual misconduct." We disagree. In this case, the kidnapping was committed for defendant's admitted purpose of making pornographic

pictures with the young victim. The victim was required to remain at a motel over her protestations and then, according to defendant, he "raped the girl". The child was then kept at the motel against her will for 4-1-2 to 5 hours. The record clearly establishes that the kidnapping and confinement charge was not merely incidental to the separate and distinct crime of criminal sexual conduct in the first degree. See People v Barker, 411 Mich 291; 307 NW2d 61 (1981); People v Adams, 389 Mich 222, 237; 205 NW2d 415 (1973).

Fourth and finally, defendant claims that his sentence of 40 to 60 years constitutes an abuse of discretion and was based on impermissible considerations. The sentence imposed by the trial court does not shock our judicial conscience and was premised upon appropriate considerations. See People v Coles, 417 Mich 523; 339 NW2d 440 (1983). Defendant in this case had a history of substance abuse and emotional problems. At 33 years of age he had only been sporadically employed. He had been convicted of two prior felonies and had earlier contacts with the juvenile court.

With respect to these crimes, the 10-year-old victim was kidnapped from a parking lot of a convenience store and confined to a motel for several hours. She was tied to a bed and a chair, and defendant performed sexual intercourse with her on two occasions. She was later dropped off in an unfamiliar neighborhood. In exchange for defendant's plea in this case, the prosecution dismissed other charges of criminal sexual conduct in the first degree and kidnapping involving another child.

In fixing the sentence, the Judge took into account the need to discipline defendant and the seriousness of the crimes involved. Because these convictions represented defendant's third and fourth felony

convictions, and involved significant personal violence, the sentencing judge thought that protection of the community was of paramount importance. The probability of reformation was viewed as slight, and the sentencing judge emphasized the vulnerability of this victim and the leadership role played by defendant in the commission of the crimes committed by him and his co-defendant.

Given the circumstances of the crime and the character and background of defendant, the trial court fashioned a sentence which fairly represented the interests of the community and those of defendant. Defendant's convictions and sentences are AFFIRMED.

/s/ William R. Beasley
/s/ Harold Hood
/s/ Randy L. Tahvonen